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A Claim for Third Party Standing in America's Prisons

N. Jeremi Duru

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I. INTRODUCTION

Everett Perry was fired for following the law. For five years, Perry worked for the Michigan Department of Corrections, known commonly as the MDOC, as a disciplinary hearing officer.[1] In essence, his duties entailed presiding over, and disposing of, major misconduct disciplinary hearings at a Michigan state prison.[2] Although the MDOC maintained an unwritten policy of limiting not guilty findings to ten percent of total dispositions, Perry routinely found approximately eighteen percent of the defendants before him not guilty.[3] He ignored the unwritten guilty verdict quota and instead decided cases based on the strength of prison regulations as they applied to the facts of those cases. In doing so, he upheld the inmates' Fourteenth Amendment due process rights in the face of a policy which, as will be explored below, robbed inmates of those rights. After disciplining Perry repeatedly, the MDOC fired him, insisting that he was a sub-par hearings officer.[4]

Perry sued the MDOC on numerous grounds,[5] but he failed to bring the most important claim available to him—a third party due process claim. Such claims are ideal for protecting the rights of those

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1 *See* Perry v. McGinnis, 209 F.3d 597, 600 (6th Cir. 2000).

2 *See id.*

3 *See id.* at 605.

4 *See id.*

5 *See id.*at 600. Perry filed a racial discrimination claim as well as a First Amendment freedom of expression claim in federal court against MDOC prison officials. In making the freedom of expression claim, Perry presented the court with facts revealing the MDOC's guilty verdict quota.

who cannot protect their own rights, and Perry's case consequently presents an ideal factual scenario for such a claim. There is no reason to believe that inmates in other prisons do not face similar injustices within their prisons' disciplinary schemes, but there is no way to gauge how pervasive such injustice may be. The informal and unwritten MDOC policy came to light only because a hearing officer refused to abide by it, was fired, and brought a claim exposing the relevant facts. In the absence of this confluence of events, the MDOC guilty verdict quota might remain known only to those charged with its enforcement.

This article will argue that third party standing to assert disciplinary hearing defendants' due process claims should be available to prison disciplinary hearing officers, such as Perry, who are terminated for disregarding disciplinary hearing guilty verdict quotas. Part II will examine the history of our nation's prison system, as well as the history of judicial reforms which have paved the way for third party due process claims on behalf of inmates subjected to prison disciplinary hearings. Part III will discuss the requirements for successful third party standing. Part IV will present Perry's case. Finally, Part V will apply the requirements for successful third party standing to the facts of Perry's case.

Ultimately, this article will assert that a third party challenge to intra-prison policies establishing guilty verdict quotas for prison disciplinary hearings provides an avenue for guaranteeing the preservation of prisoners' due process rights.

II. REFORM IN AMERICA'S PRISONS: A BRIEF HISTORY

The history of our nation's prisons is long and tortured. Today, prisons serve to punish.[6] It was not, however, always that

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[6] *See* Richard D. Nobleman, *Wilson v. Seiter: Prison Conditions and the Eighth Amendment Standard*, 24 PAC. L.J. 275, 278 (1992).

way. Through most of the eighteenth century, authorities meted punishment out in the form of torture and public humiliation.[7] Criminals were branded, whipped, or subjected to the stocks or the pillory depending on the offense committed.[8] Only minor offenders, vagrants, and the accused awaiting punishment served time in prison-like institutions called workhouses.[9] In the late eighteenth century, however, society sought a more humane method of dealing with criminals, and the penitentiary was born.[10] The rehabilitative ideal was key to the new system of imprisonment. Indeed, the goal of the penitentiary was to make the criminal feel penitent.[11] Early prison theorists believed that in the absence of deleterious influences, a criminal could be reformed into a productive member of society through hard work, religious study, and introspection.[12] Optimism, however, crumbled as penitentiaries grew overcrowded and exceedingly unpleasant and served to obstruct rather than facilitate an inmate's reintroduction to free society.[13]

Shortly after the Civil War, the rehabilitative ideal once again gained steam. Authorities exposed prisoners to educational and vocational opportunities, grouped them on the basis of personal progress, and offered them the possibility of parole if they improved.[14] Despite the continued existence of overcrowding and oppression in the nation's prisons, the idea that incarceration should serve to rehabilitate offenders persisted well into the twentieth century.[15] Ultimately, however, in the midst of widespread belief that rehabilitative efforts were unsuccessful, a retributive theory of

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7 *See id.*

8 *See* Matthew W. Meskell, *The History of Prisons in the United States from 1777 to 1877*, 51 STAN L. REV. 839, 841-42 (1999).

9 *See* Nobleman, *supra* note 6, at 277.

10 *See id.* at 278.

11 *See id.*

12 *See id.*

13 *See id.*

14 *See id.*

15 *See* Nobleman at 279.

incarceration emerged and the contemporary idea that prisons exist to punish took hold.[16] Resources for rehabilitation decreased, prison populations increased,[17] and whatever humanity managed to survive in the prison environment began to dissolve.

For much of the twentieth century—even when inmate rehabilitation remained the primary theoretical goal of incarceration—courts avoided adjudicating cases initiated by prisoners regarding prison administration, citing as reasons, lack of jurisdiction, lack of topic-specific expertise, reluctance to undermine prison discipline, and fear of being inundated with prisoner petitions.[18]

During the late 1960's and early 1970's, however, the courts, finding that prison administrators were failing to protect disciplinary hearing defendants' constitutional rights, increased their involvement in prisoner cases.[19] Years earlier, in *Price v. Johnston*,[20] the Supreme Court established that the very nature of imprisonment demands that some constitutional rights are lost to the imprisoned.[21] Other constitutional rights are, of course, preserved. *Price*, however, did not distinguish the "lost" rights from the "preserved" rights. As such, once the courts delved into intra-prison disputes with constitutional implications, the Supreme Court was faced with the task of outlining the parameters of an inmate's constitutional rights. The Court did so case by case, determining, for example, that the First and Fourteenth Amendments guarantee inmates significant religious freedoms,[22] that the Fourteenth Amendment's Equal Protection Clause protects

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16 *See id.*

17 *See id.*

18 *See id.* at 280.

19 *See id.* at 281-82.

20 334 U.S. 266 (1948).

21 *See id.* at 285.

22 *See, e.g.*, Cruz v. Beto, 405 U.S. 319, 322 (1972).

inmates from invidious racial discrimination,[23] and that inmates are guaranteed access to the courts.[24]

The Court also determined that some, but not all, protections of the Due Process Clause apply to inmates. In *Wolff v. McDonnell*,[25] the Court drew a firm distinction between due process in the criminal prosecution context and due process in the inmate disciplinary hearing context.[26] In that case, the Court was called upon to determine the amount of process to which an inmate is entitled prior to being stripped of good-time credits[27] for a disciplinary violation. As a threshold matter, the Court found the inmates had a valid liberty interest in the good-time credits.[28] The Court, therefore, proceeded in its due process analysis.

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23 *See, e.g.*, Lee v. Washington, 390 U.S. 333 (1968).

24 *See, e.g.*, Johnson v. Avery, 393 U.S. 483, 485 (1969).

25 418 U.S.539 (1974).

26 *See id* at 556. ("Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply.")

27 Good time credits are, in essence, rewards for prisoners who have exhibited good behavior while serving their sentences. Under statute, Nebraska state prisoners who accrued such credits were entitled to reduction of sentence. *See* Neb. Rev. Stat. § 83--1,107 (1972) ("(1) The chief executive officers of a facility shall reduce, for parole purposes, for good behavior and faithful performance of duties while confined in a facility the term of a committed offender as follows: Two months on the first year, two months on the second year, three months on the third year, four months for each succeeding year of his term and pro rata for any part thereof which is less than a year. In addition, for especially meritorious behavior or exceptional performance of his duties, an offender may receive a further reduction, for parole purposes, not to exceed five days, for any month of imprisonment.")

28 "It is true that the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison . . . But the state having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required

Respondents, inmates at a Nebraska prison, argued they were not afforded the procedural protections to which they were entitled under the Due Process Clause prior to losing the credits.[29] Petitioners countered that extensive procedure prior to loss of credits was unnecessary because disciplining inmates was a policy issue, not a constitutional issue.[30]

The Court determined that the Petitioners' position was "plainly untenable,"[31] noting that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country,"[32] and citing other constitutional rights to which inmates may avail themselves. Still, the Court was unwilling to provide the inmates what they sought—procedural protections tantamount to those provided for parolees.[33] Under the Court's prior decision in *Morrissey v. Brewer*,[34] parolees enjoy the protection of numerous procedures prior to suffering parole revocation.[35] Asserting that parole revocation is a more profound loss than the deprivation of good time credits, the Court chose to scrutinize the process guaranteed parolees under *Morrissey* and parse those procedural rights appropriate for the

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by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." Wolff, 418 U.S. at 557.

29 *See id.* at 553.

30 *See id.* at 555.

31 *Id.*

32 *Id.* at 555-56.

33 *See id.* at 560.

34 408 U.S.471 (1972).

35 *Id.* at 489 (holding that prior to revoking parole the following procedures must be exhausted: "(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact-finders as to the evidence relied on and reasons for revoking parole").

inmates in the case before it from those appropriate primarily in the parole revocation context.[36]

In doing so, the Court left several traditional due process protections—the ability to present documentary evidence, the right to call witnesses, and the rights to confrontation and cross-examination—to the discretion of prison officials.[37] The Court was reluctant to establish these protections as universally applicable rules, insisting that different circumstances merit different degrees of process.[38] "The better course at this time," the court insisted, "in a period where prison practices are diverse and somewhat experimental, is to leave these matters to the sound discretion of the officials of state prisons."[39]

The Court held, however, that other bedrock protections were mandatory. Specifically, the Court decided the inmates in question were entitled to a hearing and to written notice of charges against them to be presented at least twenty-four hours prior to their scheduled hearings.[40] The Court further held that, following the hearing, inmates were entitled to a written statement detailing the reasons supporting any disciplinary action.[41] Although the Court did not prescribe the parameters of the mandated hearing, it established the hearing must be meaningful and fair, noting that "[t]he touchstone

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36 *See* Wolff, 418 U.S. at 563-71.

37 *See id.* at 566-69. The Court suggested that if the procedures were not "unduly hazardous to institutional safety or correctional goals," the protections could lie, but noted that such would more likely be the case with the presentation of documentary evidence and the calling of witnesses than with confrontation and cross-examination.

38 *See id.* at 567. The court seemed particularly concerned about confrontation and cross-examination: "If confrontation and cross-examination of those furnishing evidence against the inmate were to be allowed as a matter of course, as in criminal trials, there would be considerable potential for havoc inside the prison walls. Proceedings would inevitably be longer and tend to unmanageability."

39 *Id.* at 569.

40 *See id.* at 565.

41 *See id.*

of due process is protection of the individual against arbitrary action of government."[42]

Wolff remains good law. The Court, however, narrowed the scope of cases in which a *Wolff* liberty interest could exist in its 1995 decision in *Sandin v. Conner*.[43] The Court explained:

> Under *Wolff*, States may under certain circumstances create liberty interests which are protected by the Due Process Clause. But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.[44]

Although the scope of cases to which *Wolff* applies has narrowed, the law of *Wolff* remains unaltered as to those cases. Like any law, however, it is susceptible to subversion. Indeed, because *Wolff* protects prisoners—an ostracized and alienated segment of our population with limited access to the courts, minimal political clout, and few resources—it is particularly susceptible to subversion. Prison authorities are unlikely to succeed with blatant due process violations, which are easily discerned and exposed by the various prison rights watchdog groups. Subtle due process violations, however, obscured by internal procedures and the appearance of propriety, are less likely to be uncovered. These are the truly dangerous violations. These are the violations which can be chilled with the effective assertion of third party standing.

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42 *See* Wolff, 418 U.S. at 558.

43 515 U.S. 472, 483-84 (1995).

44 *Id.* (citations omitted).

III. THE LAW OF THIRD PARTY STANDING

In general, a party may not bring an action based on a third party's constitutional rights.[45] This rule is not constitutionally mandated, but is instead a "prudential limitation on the exercise of federal jurisdiction."[46] To fully understand the third party standing doctrine, we must understand its history.

In *Singleton v. Wulff*, decided in 1976, the Supreme Court set forth the two reasons justifying the rule's existence.[47] First, the courts should avoid adjudicating rights without cause.[48] Since the possessor of a right may not wish to assert it, adjudicating the right when brought by a non-possessor may result in unnecessary adjudication.[49] Second, the possessor of the right is generally the most effective advocate of the right, and because the adversarial system relies on parties to advocate effectively it follows that the most effective advocate of a right should be left with the duty of asserting the right.[50] Where these justifications are absent, however, the Court has determined that the rule against third party standing need not apply.[51] Thus, exceptions to the rule exist.

In *Singleton*, the Court considered several elements in determining whether third party standing was appropriate. That case involved a Missouri statute that limited funding for abortions.[52] Missouri was a participant in the Medicaid program, and as such, was entitled to federal funds for use in providing medical assistance to the state's under-resourced population as long as the federal government approved its plan for serving that population. The Missouri statute

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45 *See* McGowan v. Maryland, 366 U.S. 420, 429 (1961).

46 Miller v. Albright, 523 U.S.420, 445 (1998) (O'Connor, J., concurring).

47 *See* Singleton v. Wulff, 428 U.S. 106, 113-14 (1976).

48 *See id.*

49 *See id.*

50 *See id.* at 114.

51 *See id.*

52 Mo. Rev. Stat. §§ 208.151-208.158 (1975).

containing the plan set forth twelve categories of services eligible for Medicaid support. One of the twelve was "[f]amily planning services as defined by federal rules and regulations; provided, however, that such family planning services shall not include abortions unless such abortions are certified in writing by a physician."[53] Two Missouri physicians, both of whom had performed and anticipated performing abortions, sued for a declaration that the statute was invalid and for an injunction against enforcement of the statute.[54] The federal district court hearing the case dismissed the physicians' complaint for lack of standing.[55] The United States Court of Appeals for the Eighth Circuit reversed, and the Supreme Court granted certiorari in order to squarely address the third party standing issue.[56] The Court approached third party standing in a more structured manner than it had in the past, crafting a three-step analysis to examine the physicians' claim for standing. The Court ultimately determined that the physicians did have third party standing.[57] Their determination, however, was far less important than the process that led them to it. That process is the backbone of today's third party standing analysis.

First, the Court sought to determine whether the plaintiff suffered an "injury in fact" such that the proceeding would qualify as a "case or controversy," giving federal courts jurisdiction over the matter under Article III.[58] This requirement is, of course, not unique to third party standing analysis. It serves as a basic constitutional barrier to adjudication when no truly adverse relationship exists, and it is firmly rooted.[59] Indeed, "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or

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53 *Id* § 208.152.

54 *See* Singleton, 428 U.S. at 109.

55 *See id* at 110.

56 *See id.* at 111-12.

57 *See id.* at 108.

58 *Id* at 112.

59 *See* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976).

controversies."[60] The inquiry is strait-forward. Article III requires that "the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision."[61] If the plaintiff is unable to make such a showing, federal court adjudication would be gratuitous, and it is thus prohibited.[62]

Once the *Singleton* Court was satisfied that the plaintiff sustained actual injury, it moved to the next step of the analysis—whether a party who has sustained an actual injury should be able to base his or her claim or defense on a third person's rights.[63] No constitutional doctrine controls this portion of the analysis, and as such, the Court was left to determine whether "as a prudential matter" the plaintiff was an appropriate proponent of the asserted right.[64]

Unhampered by any constitutional standard, the courts are bound only by judicial discretion in erecting barriers to third party standing.[65] Perhaps for this reason, third party standing doctrine is fluid and has at times been unclear. Attempting to clarify the law, the *Singleton* Court announced that "the Court has looked primarily to two factual elements to determine whether the rule should apply in a particular case" and then explained the importance of the two elements in disposing of the case.[66]

The first element is the relationship between the possessor of the right and the litigant.[67] The court reasoned that if the relationship is such that the possessor's "enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue," the court can be confident that attention to the controversy will result in the possessor's increased enjoyment of the right and that the litigant has

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60 *Id.* at 37.

61 *Id.* at 38.

62 *See id.*

63 *See* Singleton, 428 U.S. at 117.

64 *Id.* at 112.

65 *See* Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 278 (1984).

66 Singleton, 428 U.S. at 114.

67 *See id.*

appropriate incentives to advocate effectively.[68] Such a relationship's existence ensures that incentives are properly aligned and that the litigant will be a strong advocate, but does not address a court's concern about unnecessary adjudication in the event that the possessor has no interest in raising the issue. Thus, the Court set out a second element—the possessor's ability, or lack thereof, to assert the right.[69] If, in fact, the possessor is unable to assert the right, the possessor's inaction ceases to imply disinterest, and instead suggests powerlessness.[70] Where there is an injury in fact and both of these elements exist, the justifications for the general prohibition against third party standing are hollow, and the exception to the rule lies.

In the 1991 case of *Powers v. Ohio,*[71] the Court crafted the *Singleton* elements into the modern test for third party standing. The Court articulated a three-pronged test—each prong being a precondition to third party standing.[72] In that case, Powers, a white man on trial for murder, sought to assert the equal protection rights of seven black potential jurors who were excluded from the jury as a result of the state's peremptory challenges.[73] The Supreme Court ultimately found Powers was entitled to third party standing.[74]

The *Powers* Court, however, took curious liberties with *Singleton* in announcing the line of analysis it would follow, making third party standing more difficult to attain. The Court began its examination by asserting that a party can obtain third party standing "provided three important criteria are satisfied."[75] Relying on *Singleton*, the *Powers* court stated that to obtain third party standing a "litigant *must* have suffered an 'injury in fact,' thus giving him or her

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68 *Id.* at114-15.
69 *See id.* at 115-16.
70 *See id.* at 116.
71 499 U.S. 400 (1991).
72 *See id.* at 410-11.
73 *See id.* at 403.
74 *See id.* at 415.
75 *Id.* at 410-11.

a 'sufficiently concrete interest' in the outcome of the issue in dispute, the litigant *must* have a close relation to the third party, and there *must* exist some hindrance to the third party's ability to protect his or her own interests."[76] The *Powers* Court did not alter the analysis to be used in applying any of the particular elements.[77] However, it established that the close relationship and hindrance elements were necessary to any finding of third party standing—something the *Singleton* court seemingly did not do.

The Eleventh Circuit commented on the *Powers* Court's peculiar restatement of *Singleton* in disposing of a 1994 case involving a claim for third party standing.[78] The Eleventh Circuit panel noted that although the *Powers* Court referred to the *Singleton* factors as criteria necessary to a finding of third party standing, *Singleton* did not go so far.[79] Referring to the three *Singleton* factors, the panel asserted,"[a]lthough the *Powers* Court characterized these factors as 'criteria' that must be met in order to justify third party standing, the Court has not always been so clear . . . as to how the factors should be applied and whether or not all of the factors must be met in order to justify third party standing."[80]

The language of *Singleton* provides further evidence that the *Singleton* Court did not intend to establish that a plaintiff need meet all three of its elements to obtain third party standing. Although the *Singleton* Court demanded the plaintiff suffer a concrete injury in order to obtain third party standing, it did not insist that the close relationship and hindrance elements be considered under third party

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[76] *Id.* at 411. (quoting Singleton v. Wulff, 428 U.S. 106, 112 (1976)) (citations omitted) (emphasis added).

[77] Interestingly, the *Powers* Court used the word hindrance to describe what the *Singleton* Court called a genuine obstacle. There is no evidence in either case, or in the cases that followed, to suggest that "hindrance" has any legal significance that "genuine obstacle" does not. The terms are used interchangeably.

[78] Harris v. Evans, 20 F.3d.1118, 1122 (11th Cir. 1994).

[79] *See id.* at 1122.

[80] *Id.*

standing analysis. By referring to those two elements not as prongs of a test, but simply as elements, and by looking to them "primarily"[81] instead of exclusively, the Court did not create a concrete test for use in determining issues of third party standing.[82] Interestingly, the *Powers* Court made no pretense of interpreting, amending, or overruling *Singleton*. It apparently endeavored merely to restate Singleton, and seemed to do so incorrectly. The consequences of the *Powers* Court's restatement of *Singleton* are obvious. The *Powers* test significantly limits the circumstances under which a litigant may obtain third party standing by demanding the litigant meet each of three criteria to do so.

Correct interpretation or not, the *Powers* three-pronged test drives today's third party standing analysis. Although the application and meaning of the injury in fact prong is clear, the meanings of the close relationship and hindrance prongs are not. As such, I explore the meanings of each of these two prongs as they have developed over the years. As noted above, the close relationship and hindrance prongs are not constitutional requirements. They are court-created barriers to litigation, which were first clearly articulated in *Singleton* and were molded into a concrete test in *Powers*. Because *Powers* relies flatly upon each *Singleton* prong (if not upon the relationship among the prongs) in establishing the contemporary test for third party standing, we must analyze *Singleton,* and as such, the cases upon which Singleton relies, as well as Powers and its progeny, in

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[81] Singleton v. Wulff, 428 U.S. 106, 114 (1976).

[82] The confusion created by the Court's decision in *Powers* is further evidenced in Professor Erwin Chemerinsky's *Federal Jurisdiction*, one of the academy's foremost authorities on the complexities in federal jurisdictional law. In explaining the exceptions to the general prohibition on third party standing, Professor Chemerinsky asserts *Singleton's* close relationship and hindrance factors as two entirely separate and independent exceptions. *See* Erwin Chemerinsky, *Federal Jurisdiction* § 2.3.4 (2d ed. 1994). This view is directly at odds with *Powers*, perhaps indicating Professor Chemerinsky's disapproval of the Court's alteration of *Singleton* in *Powers*.

order to understand the application of the close relationship and hindrance prongs.

A. The Close Relationship Prong

The "close relationship" necessary to clear this prong is not what it would seem. As noted above, the Court views the existence of a close relationship as a proxy for assurance that the litigant will advocate effectively and that settling the controversy will increase the possessor's enjoyment of the right.[83] Thus, "close" in this context is not synonymous with loving or affectionate. A close relationship under the test is one in which the litigant's interests are linked to those of the possessor; one in which the improvement of one's condition is bound up with the improvement of the other's. The cases bear this out.

The predecessors to *Singleton*—the three cases *Singleton* cites as displaying an appropriately close relationship between litigant and possessor—provide a range of relationships deemed acceptable under the prong. None involve a traditionally affectionate relationship, but all involve linkage between litigant and possessor.

Barrows v. Jackson,[84] a case decided in 1953, involved a restrictive covenant binding all owners of real estate in a particular Los Angeles, California neighborhood.[85] The covenant prohibited any owner from selling property to a non-white person.[86] One of the parties to the covenant sold to a non-white, and other parties to the covenant sued for breach.[87] The respondent (the defendant at trial) defended on the grounds that the covenant violated the Fourteenth Amendment's Equal Protection Clause, and that to render a judgment against her for breaching the covenant would amount to

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[83] Singleton, 428 U.S. at 114.
[84] 346 U.S. 249 (1953).
[85] *See id.* at 251.
[86] *See id.*
[87] *See id.*

unconstitutional state action.[88] The court began its discussion of standing by noting that "[o]rdinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party."[89] The Court, however, ultimately determined standing was appropriate, noting, among other things, that the relationship between the litigant and the possessor was such that the litigant was as effective a proponent as the possessor.[90]

In *Griswold v. Connecticut*,[91] the relationship at issue existed between the executive director of the Planned Parenthood League of Connecticut and the medical director of the League's New Haven Center (a licensed physician) on the one hand, and married people seeking their advice on issues of contraception on the other.[92] A Connecticut statute in effect at the time outlawed the use of any drug or instrument to prevent conception.[93] Another statute prohibited any person from assisting any other person in committing an illegal offense.[94] In a particular instance, the directors prescribed a contraceptive device to a married woman seeking to prevent conception.[95] The directors were prosecuted as accessories, found guilty, and fined $100 each.[96] They sought to defend by raising the constitutional rights of the married people whom they counseled.[97] The Supreme Court accepted their argument and held that the directors had standing to raise their counselees' constitutional privacy

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88 *See id.* at 254-55.

89 *Id.* at 255.

90 Barrows v. Jackson, 346 U.S. at 259. Indeed, the Court asserted that "[respondent] is the one in whose charge and keeping reposes the power to continue to use her property to discriminate or to discontinue such use." *Id.*

91 381 U.S. 479 (1965).

92 *See id.* at 480.

93 *See id.*

94 *See id.*

95 *See id.*

96 *See id.*

97 Griswold v. Connecticut, 381 U.S. at 480.

rights.[98] Citing *Barrows*, among other cases, the Court stressed the intertwined nature of the litigants' interests and the possessors' rights, noting that the privacy rights of husband and wife "are likely to be diluted or adversely affected unless those rights are considered in" the directors' suit.[99]

Eisenstadt v. Baird,[100] decided seven years after *Griswold*, involved similar facts and resulted in the same conclusion. In that case, the defendant at trial, William Baird, displayed contraceptive articles during a lecture at Boston University and at the end of the lecture gave an attendee a package of vaginal foam.[101] He was convicted under a statue prohibiting any person other than a physician or a pharmacist from dispensing contraceptives.[102] Baird appealed and eventually reached the United States Supreme Court. As an initial matter, the Court determined Baird did have standing to challenge the statute as being unconstitutional.[103] If *Griswold* left any impression that the affection between counselor and counselee was important to the Court's finding that the relationship survived the test, *Eisenstadt* disabused us of it. The *Eisenstadt* Court granted Baird standing to raise the possessor's constitutional rights although he had no relationship with the possessor. Again, the Court stressed the importance of the relationship between the advocacy and the right, not the relationship between the individuals as individuals.[104] Citing *Griswold*, the Court reemphasized that the possessor's rights would be adversely effected if Baird was unable to raise them, and noted that Baird's advocacy would be a good proxy for the possessor's.[105] On these grounds, the court granted standing.

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98 *See id.* at 481.

99 *See id.*

100 405 U.S. 438 (1972).

101 *See id.* at 440.

102 *See id.* at 440-41.

103 *See id.* at 444.

104 *See id.* at 445.

105 *See id.* at 445-46.

Analysis of these cases reveals the relationship that the *Singleton* Court demanded in applying the close relationship prong is the relationship between the litigant's advocacy and the possessor's right, not between the litigant and the possessor.

Powers reaffirmed the *Singleton* Court's vision of the nature of an appropriately close relationship for purposes of third party standing analysis.[106] The *Powers* Court found that the litigant (the criminal defendant) and the possessor (the excluded juror) had a sufficiently close relationship under third party standing analysis.[107]

Though the Court noted the possibility that the voir dire process allows for the criminal defendant to develop a relationship and even some semblance of trust with jurors, it focused on the relationship between the litigant's advocacy and the possessor's right.[108] "[The] congruence of interests makes it necessary and appropriate for the defendant to raise the rights of the juror. And, there can be no doubt that [the defendant] will be a motivated, effective advocate for the excluded venirepersons' rights."[109]

B. The Hindrance Prong

If, indeed, a possessor has the realistic option of asserting a right and chooses not to do so, any argument for third party standing as to the adjudication of that right dissolves. Any rule subjecting an unwilling possessor to the assertion of his own rights flies in the face of the Court's aversion to unnecessary constitutional adjudication.[110] As such, the hindrance prong ensures that third party standing be granted when a possessor is unable to assert his rights, but not when a possessor is simply unwilling to do so.[111] Just as it did with the "close relationship" issue, the *Singleton* Court relied on three cases in setting out what qualifies as a genuine hindrance in third party standing

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106 *See* Powers v. Ohio, 499 U.S. 400, 413-14 (1991).

107 *See id.*

108 *See id.*

109 *See id.* at 414.

analysis. In essence, the cases establish that a hindrance exists if it would be difficult—not necessarily impossible—for a possessor to assert his right. Absolute impossibility is not required.

As with its discussion of the "close relationship" requirement, in explaining the meaning of a genuine obstacle or hindrance, the *Singleton* Court turned to *Eisenstadt* and *Barrows* for support.

The *Eisenstadt* Court faced a situation in which the possessors had no convenient avenue to assert their rights themselves. The statute under which Baird was convicted prevented certain persons from dispensing contraceptives but contained no provision penalizing the recipients of contraceptives—the parties whose privacy rights were infringed by the statute.[112] The Court noted the recipients "[were] not themselves subject to prosecution and, to that extent, [were] denied a forum in which to assert their rights."[113] As such, the Court found that the possessors in *Eisenstadt* faced a hindrance to their assertion of their rights.[114]

The *Barrows* Court found the same—that the possessors would likely not be able to effectively assert their rights.[115] In *Barrows*, the possessors were obviously not parties to the discriminatory covenant, and the Court determined that at the time their chances of successfully suing on the basis of the covenantor's refusal to sell to them were slim.[116] Thus, the court found an appropriate hindrance existed.

The *Singleton* Court also relied on *NAACP v. Alabama*[117] in fleshing out the meaning of a hindrance. In that case, the State of Alabama sought to compel the National Association for the Advance-

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[110] *See* NAACP v. Alabama, 357 U.S. 449, 459 (1958); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936).

[111] *See* Singleton v. Wulff, 428 U.S. 106, 116 (1976).

[112] *See* Eisenstadt v. Baird, 405 U.S. 438, 440-42, 446 (1972).

[113] *See id.* at 446.

[114] *See id.*

[115] *See* Barrows v. Jackson, 346 U.S. 249, 259 (1953).

[116] *See* Singleton, 428 U.S. at 125. (Powell, J., concurring).

[117] 357 U.S. 449 (1958).

ment of Colored People ("NAACP") to disclose the names on its membership lists.[118] The Court noted that "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech".[119] The Court then found that compelled disclosure of the lists could curtail that constitutional freedom by destroying anonymity, and thus violating each member's constitutional rights.[120] Finding as such, the Court was forced to address the NAACP's argument that it should be granted standing to assert the constitutional rights of its members. The Court determined resolutely that it should,[121] basing its decision on the reality that the rights would otherwise go unprotected.[122] "To require that [the right] be claimed by the members themselves," the Court wrote, "would result in nullification of the right at the very moment of its assertion."[123] In other words, if the members were forced to stand and assert their own rights, they would be undermining their goal—the preservation of their anonymity.

Crucial to the *Singleton* Court's analysis was its explicit declaration that absolute impossibility was not necessary for a finding of sufficient hindrance. The Court stressed that in each of the three cases upon which it relied—*Barrows*, *Eisenstadt*, and *NAACP*—the possessor's assertion of the right was difficult but not impossible.[124]

In response to Justice Powell's dissent in *Singleton* in which he argued that unlike *Singleton*, the three cases relied upon by the *Singleton* majority "allow assertion of third party rights only when such assertion by the third parties themselves would be 'in all practicable terms impossible'," Justice Blackmun, writing for the

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[118] *See id.* at 453.

[119] *Id.* at 460.

[120] *See id.* at 460-61.

[121] *See id.* at 466.

[122] *See id.* at 459.

[123] NAACP v. Alabama, 357 U.S. at 459.

[124] *See* Singleton v. Wulff, 428 U.S. 106, 116 n.6. (1976).

majority, insisted that "[c]arefully analyzed, [the] cases do not go that far."[125] Justice Blackmun then proceeded to examine the facts of each case in proving his point:

> The Negro real-estate purchaser in *Barrows*, if he could prove that the racial covenant alone stood in the way of his purchase (as presumably he could easily have done, given the amicable posture of the seller in that case), could surely have sought a declaration of its invalidity or an injunction against its enforcement. The Association members in *NAACP v. Alabama* could have obtained a similar declaration or injunction, suing anonymously by the use of pseudonyms. The recipients of contraceptives in *Eisenstadt*... could have sought similar relief as necessary to the enjoyment of their constitutional rights.[126]

The Court noted that these alternatives were not easy, and that indeed, some were extremely difficult.[127] Still, the Court insisted they were possible.[128] The Court refused to set the bar at impossibility, and for good reason—the hindrance prong merely exists to ensure the possessor's inaction is not born of disinterest.[129] The Court determined that a finding of absolute impossibility was unnecessary to achieving that purpose, and thus concluded some degree of difficulty was enough.

If any life remained in the debate between Justices Blackmun and Powell as to the proper application of the hindrance prong, *Powers* snuffed it out. In addressing the hindrance prong, the *Powers* Court determined that the possessors (individual jurors who suffered

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125 *Id.*

126 *Id.*

127 *See id.*

128 *See id.*

129 *See id.* at 116.

racial exclusion) faced sufficient obstacles in asserting their rights such that the litigant satisfied the hindrance prong in his attempt to obtain third party standing.[130] In explaining its determination, the court left no room for guess work regarding whether assertion of rights need be impossible or merely difficult: "We have held that individual jurors subjected to racial exclusion have the legal right to bring suit on their own behalf. As a practical matter, however, these challenges are rare."[131] The Court's meaning is plain. The jurors can sue if they want, but they are unlikely to do so. "The reality is that a juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights."[132] In deciding that the jurors in question confronted sufficient hindrances in asserting their rights, the *Powers* Court firmly established that when a possessor can legally assert a right, but is extremely unlikely to do so, the hindrance prong is satisfied.

C. Third Party Standing in the Aftermath of Powers v. Ohio

The test for third party standing, as *Powers* established it, reigns today. Of course, there has been some dissension. A minority of the Supreme Court has attacked the *Powers* test as granting third party standing too broadly. It did so most notably in *J.E.B. v. Alabama*,[133] a 1994 case in which the Court found third party standing to be appropriate. In that case, the State of Alabama, on behalf of the mother of a minor child, brought an action for paternity and child support against the child's father.[134] At trial, the state used all but one of its peremptory strikes to eliminate male jurors.[135] The defendant, in

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130 *See* Powers v. Ohio, 499 U.S. 400, 414-15 (1991).
131 *Id.* at 414.
132 *Id.* at 415.
133 511 U.S. 127 (1994).
134 *See id.* at 129.
135 *See id.*

turn, used all but one of his peremptory strikes to eliminate female jurors.[136] Because the panel of potential jurors included many more females than males, the resultant jury was entirely female.[137] At the close of trial, the jury found against the defendant and ordered that he pay child support.[138]

The defendant appealed on the grounds that the state's peremptory challenges based solely on gender violated the Equal Protection Clause of the Fourteenth Amendment.[139] The case eventually reached the Supreme Court. Noting that intentional gender discrimination by the state or by an agent thereof violates the Equal Protection Clause, the Court found for the petitioner (the defendant below).[140] Because the petitioner was asserting the rights of male jurors instead of his own rights, he obviously relied on third party standing. Interestingly, the Court did not directly address the standing issue in its opinion, perhaps secure in what it considered to be the obviousness of third party standing's applicability in this case.

Writing in dissent, and joined by Justices Rehnquist and Thomas, Justice Scalia maligned the court for according the petitioner standing.[141] Justice Scalia took issue with the Court's determination that the state's peremptory challenges were unconstitutional, but argued that if anybody had a viable cause of action, it was one of the eliminated jurors.[142] "[T]he only arguable injury from the prosecutor's "impermissible" use of male sex as the basis for his peremptories is injury to the stricken juror, not to the defendant."[143] Justice Scalia seemed disturbed that the Court was not explicit in its grant of standing, and indicated that *Powers* was at its root.[144] "The Court

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136 *See id.*

137 *See id.*

138 *See id.*

139 J.E.B. v. Alabama, 511 U.S. at 130.

140 *See id.* at 130-31.

141 *See id.* at 158-59. (Scalia, J., dissenting).

142 *See id.* at 158.

143 *Id.*

144 *See id.* at 158-59.

today presumably supplies petitioner with a cause of action by applying the uniquely expansive third party standing analysis of *Powers v. Ohio*, according petitioner a remedy because of the wrong done to male jurors."[145]

Justice Scalia explained neither why he believed that the *Powers* analysis is unique, nor the ways in which he would reduce its expanse. He merely referred to third party standing in this instance as "making restitution to Paul when it is Peter who has been robbed" and condemned it as being a bad idea.[146] Justice Scalia then moved on to the heart of his dissent—his argument that the peremptory challenges made at trial were not unconstitutional.[147]

The Supreme Court had the opportunity to consider third party standing again in 1998 when it heard *Campbell v. Louisiana*,[148] and again it adhered to the *Powers* analysis—this time with a solid 7-2 majority. *Campbell* is in many ways similar to *Powers*. Terry Campbell, a White man convicted of second-degree murder, appealed his conviction on the ground that the grand jurors who indicted him were selected in a discriminatory manner.[149] Relying on *Powers*, he argued that he had standing to assert the rights of the excluded Black jurors.[150] Applying the *Powers* test, the Supreme Court found that Campbell met all three prongs of the test, and that he was thus entitled to standing.[151] The Court could "find no reason why a white defendant would be any less effective an advocate for excluded grand jurors than for excluded petit jurors," and thus followed the logic of *Powers* in reaching its decision.[152]

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145 J.E.B. v. Alabama, 511 U.S. at 158-59 (citations omitted).
146 *Id.* at 159.
147 *See id.*
148 523 U.S. 392 (1998).
149 *See id.* at 395.
150 *See id.* at 397.
151 *See id.* at 400.
152 *Id.*

With Justice Rehnquist having defected to the majority on the standing issue, Justices Scalia and Thomas stood alone in their opposition to the Court's analysis. Justice Thomas, writing for the two, argued strenuously that *Powers* was wrongly decided.[153] Asserting that "*Powers* distorted standing principles . . . and should be overruled,"[154] he pushed for a more narrow application of third party standing.[155] Representing two of nine justices, however, Thomas' argument had no impact on the controlling law.

The Court wrestled with the requirements for third party standing yet again in *Miller v. Albright*,[156] and again the justices decided to grant third party standing by a comfortable margin. That case involved a woman, Lorelyn Miller ("Lorelyn"), born out of wedlock to a Filipino woman and an American man.[157] Lorelyn, who was born in the Philippines, applied to the State Department in 1992 for registration as an American citizen, and was denied.[158] Shortly thereafter, Charlie Miller ("Charlie"), her father, sought a paternity decree establishing Lorelyn as his daughter.[159] A Texas court granted the paternity decree and Lorelyn reapplied for citizenship.[160] She was again denied, this time because the State Department determined that the paternity decree failed to satisfy a federal statute—8 U.S.C. § 1409—requiring that a child born outside of the United States and out of wedlock to an American mother and a non-American father be legitimated before the child reaches eighteen years of age if the child is to acquire American citizenship.[161] Lorelyn turned eighteen in

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153 *See id.* at 403-09. (Thomas, J., dissenting).
154 Campbell v. Louisiana, 523 U.S. at 404.
155 *See id.* at 403-08.
156 523 U.S. 420 (1998).
157 *See id.* at 424-25.
158 *See id.* at 426.
159 *See id.*
160 *See id.*
161 *See id.*

1988, and was thus well passed eighteen when she applied for citizenship.[162]

Both Lorelyn and Charlie sued the Secretary of State in federal court seeking American citizenship for Lorelyn.[163] They noted that children born in other countries to an American mother and a non-American father were granted American citizenship at birth and argued that, as such, the statute's disparate treatment of citizen mothers and citizen fathers violated Charlie's Fifth Amendment equal protection rights.[164] At the district court level, the government moved to dismiss Charlie's complaint on the ground that if any person's rights were offended they were Lorelyn's, not Charlie's.[165] In actuality, it was established later in the process of litigation that Charlie's Fifth Amendment equal protection rights were indeed the implicated rights.[166] The district court, however, accepted the government's argument, and dismissed Charlie's claim for lack of standing.[167] As to Lorelyn's claim, the court held that although she suffered injury, federal courts are not authorized to grant citizenship, and as such her injury could not be redressed.[168] Charlie did not press his claim on appeal, but Lorelyn did.

When Lorelyn's case reached the Supreme Court, the Court was forced to address whether she had standing to assert Charlie's equal protection right. The opinion as a whole was fragmented, with five different justices writing. On the issue of third party standing, however, only two justices argued against granting standing. No justice disputed that Lorelyn established she had suffered an injury in fact or that her advocacy and her father's right were appropriately co-dependant. The only debate on the standing issue regarded the

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[162] Miller v. Albright, 523 U.S. at 425.
[163] *See id.* at 426.
[164] *See id.*
[165] *See id.* at 426-27, 448.
[166] *See id.* at 448.
[167] *See id.* at 426-27.
[168] Miller v. Albright, 523 U.S. at 427.

hindrance prong. Justice Stevens, who was joined by Justice Rehnquist in announcing the judgment of the Court, focused his opinion on the alleged constitutionality of § 1409, giving the standing issue scant attention. Regarding standing, he noted simply that the Court "agree[s] with the Court of Appeals that [Lorelyn] has standing to invoke the jurisdiction of the federal courts."[169]

Justice Breyer, joined by Justices Souter and Ginsberg, dissented as to the Court's judgment regarding the constitutionality of § 1409, but agreed with Justice Stevens on the standing issue. Perhaps dissatisfied with Justice Stevens' cursory treatment, Justice Breyer dedicated a significant portion of his opinion to explaining why Lorelyn was entitled to standing. He argued forcefully that the government hindered Charlie from pursuing his claim.[170] Specifically, he argued that the government's motion to dismiss Charlie's complaint on the ground that his rights were not implicated, the district court's consequent dismissal, and a subsequent change of venue effectively prevented the assertion of his rights.[171] Justice Breyer acknowledged that Charlie was not entirely barred from asserting his rights.[172] He wrote, however, that "[a]ppeals take time and money; the transfer of venue left the plaintiffs uncertain about where to appeal; the case was being heard with Lorelyn as plaintiff in any event; and the resulting comparison of costs (viewed prospectively) likely would have discouraged Charlie's pursuit of the alternative appeal route."[173]

Justice Scalia, joined by Justice Thomas, concurred in the Court's judgment and agreed with the Court's decision to grant standing.[174] He established, though, that he did not agree with Justice

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169 *Id* at 433.

170 *See id.* at 474. (Breyer, J., dissenting).

171 *See id.*

172 *See id.*

173 *Id.*

174 Miller v. Albright, 523 U.S. at 452, 455 n.1. (Scalia, J., concurring).

Breyer's dissent as it regarded standing,[175] perhaps for fear that Justice Breyer sought to open the courthouse door too widely. Justice Scalia simply wrote—without explanation—that if it were his decision to make he would have granted Lorelyn standing to assert Charlie's rights.[176]

Justice O'Connor and Justice Kennedy, represented by Justice O'Connor's opinion, stood alone in their opposition to the Court's grant of standing. Justice O'Connor argued that Lorelyn did not have standing to assert her father's rights because her father was not sufficiently hindered in asserting his own rights.[177] She noted that Charlie's only hindrance was his setback at the trial court level, and that nothing prevented him from appealing the district court decision.[178] Justice O'Connor seemed to fear the birth of a phenomenon in which a litigant loses at trial and considers such a loss a hindrance for standing analysis purposes, chooses not to appeal, and then passes the proverbial baton to a second litigant who satisfies the injury in fact and close relationship prongs and is perhaps better equipped to pursue the litigation. Indeed, she asserted that a conclusion that Charlie was sufficiently hindered "would be a step toward eliminating the hindrance prong altogether."[179] The other seven Justices, however, obviously disagreed with Justice O'Connor's perspective, leaving the *Powers* three-pronged test intact.

Although the *Powers* test carries the day, the precise parameters of each prong is not exceedingly well-defined. Indeed, referring to the requirements for third party standing, Justice Scalia has gone so far as to assert that "[the Court's] law on [the] subject is in need of what may charitably be called clarification . . . ."[180] While Justice Scalia may be stating the case a bit strongly, the contours of

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[175] *See id.* at 455 n.1.

[176] *See id.*

[177] *See id.* at 448. (O'Connor, J., concurring).

[178] *See id.*

[179] *Id.* at 449.

[180] Miller v. Albright, 523 U.S. at 455 n.1. (Scalia, J., concurring).

the doctrine are admittedly not entirely clear. At a minimum, though, the Court's jurisprudence as developed in cases spanning half-a-century—from the predecessors to Singleton through Powers and its progeny—has taught us this: In order for a litigant to acquire third party standing, (1) the litigant must have suffered some injury due to the impingement of the possessor's right, (2) the relationship between the litigant's advocacy and the possessor's right must be such that the litigant has an appropriate incentive to advocate effectively and that the litigant's advocacy, if successful, will lead to the possessor's greater enjoyment of his right, and (3) the possessor must face some hindrance (though it need not be insurmountable) to the assertion of his own rights. With this understanding of the prevailing law, we launch an analysis of Perry's case.

IV. PERRY'S CASE

Everett Perry worked for the MDOC for five years.[181] During that time he served as a disciplinary hearing officer in the MDOC's office of Policy and Hearings.[182] The MDOC's inmate disciplinary process is not unlike the processes utilized in other state prison systems. When an inmate is charged with a violation of prison rules, he or she appears at a disciplinary hearing at which an adjudicator determines the guilt or innocence of the charged party.[183] Perry was one such adjudicator. Specifically, the state entrusted him with hearing, and disposing of, major misconduct cases within the prison.[184] Perry's tenure with the MDOC began auspiciously. The MDOC evaluates each of its new hearing officers after three months and then again after six months; Perry received satisfactory evaluations on both occasions.[185] Indeed, during his first eighteen

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[181] *See* Perry v. McGinnis, 209 F.3d 597, 600 (6th Cir. 2000).

[182] *See id.*

[183] *See* Mich. Comp Laws § 791.251(2)(a)(1999).

[184] *See* Perry, 209 F.3d at 600.

[185] *See id.* at 605.

months as a hearing officer, Perry received strong reviews.[186] In March of 1990, Perry's supervisor cited Perry for the unsatisfactory disposition of a case.[187] It was Perry's first negative citation.[188] Forty-three months and twenty-three citations later, Perry was fired.[189]

Following his termination, Perry alleged that his citations for unsatisfactory disposition of cases were pretextual.[190] He maintained that he was cited and eventually terminated in retaliation for his insistence on impartiality during his hearing and disposition of disciplinary cases.[191]

Substantial evidence supports his contention. The twenty-three citations in forty-three months were not what they would seem. In fact, during the first twenty-seven of those forty-three months, Perry was only cited four times.[192] During the remaining sixteen months, he was cited nineteen times.[193] Perry argued that the dramatic increase in citations was not coincidental. He noted that on June 18, 1992—twenty-seven months into his employment—his supervisor wrote a memorandum to the Administrator of the MDOC's Office of Policy and Hearings in response to the Administrator's request for a review of Perry's decisions favoring inmates.[194] The memorandum concluded that Perry too frequently issued dismissals and not-guilty findings.[195] After production of the memorandum, the frequency with which Perry was cited substantially increased.[196] As noted above, he received nineteen citations over his final sixteen months on the job. Perry insisted the increase in citations was a direct result of the

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186 *See id.*
187 *See id.*
188 *See id.*
189 *See id.*
190 Perry v. McGinnis, 209 F.3d at 605.
191 *See id.*
192 *See id.*
193 *See id.*
194 *See id.*
195 *See id.*
196 Perry v. McGinnis, 209 F.3d at 605.

memorandum. He provided extensive evidence that the MDOC demanded its hearing officers limit not-guilty findings and dismissals to ten percent of the cases before them and acknowledged that he disregarded the ten percent goal.[197] He insisted that he considered the facts before him and disposed of cases impartially without concern for any particular guilty verdict quota.[198] Ultimately, his disposition of cases resulted in not-guilty findings and dismissals in approximately eighteen percent of his cases—a rate well above the organizational goal.[199]

Perry's argument that the MDOC frequently cited and finally terminated him because he did not abide by the ten percent standard is strengthened by the nature of his citations. The MDOC cited Perry for transgressions frequently committed by other hearing officers but for which other hearing officers were not cited, and for other seemingly trivial mistakes.[200] He was eventually fired on the strength of the numerous citations.

V. PERRY'S POTENTIAL THIRD PARTY STANDING CLAIM

Perry's third party due process claim would be simple. Perry would argue that the state committed a due process violation by placing a cap on the number of not-guilty determinations and dismissals occurring during the scope of a prison's disciplinary hearings. As noted above, not all prison discipline implicates an inmate's due process rights secured under *Wolff*. In *Sandin*, the Supreme Court seemingly limited the circumstances in which an inmate's liberty interest is triggered to certain cases in which an inmate is restrained.[201] Presumably, not all of the cases brought before

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[197] *See id.* at 606.

[198] *See id.*

[199] *See id.* at 605.

[200] *See id.* at 602-3.

[201] Sandin v. Conner, 515 U.S. 472, 483-84 (1995).

Perry involved such a potential punishment. Some, however, certainly did. Under Michigan statute, the hearings division of which Perry was a part is responsible for adjudicating cases involving "[a]n infraction of a prison rule that may result in punitive segregation . . . ."[202] Since the ten percent not-guilty standard was applied across the board—including cases involving possible punishment of punitive segregation, and thus potentially triggering a liberty interest—the due process rights of at least some of the inmates before Perry were implicated.

It goes without saying that a pre-determined guilty percentage ensures the absence of case-by-case impartial adjudication, and guarantees arbitrariness. As Judge Damon Keith wrote in discussing the MDOC guilty verdict quota in *Perry v. McGinnis*, "[t]he prisoner whose case merits a not-guilty finding, but whose case would result in the eleventh not-guilty finding in one hundred decisions, is sunk. His fate is sealed before his file is opened. Such a system reeks of arbitrary justice, which can only be injustice."[203] Because "[t]he touchstone of due process is protection of the individual against arbitrary action of government[,]"[204] due process certainly suffers a beating under this regime.

The due process right at stake, however, is the inmate's right. The inmate is the individual faced with the possibility of a guilty finding based not on the facts as applied to prison regulations, but on the desire to increase the occurrence of guilty findings in a prison's disciplinary hearings. The hearing officer, himself, suffers no obstruction to his due process rights. He does, however, suffer because of the violation. Because of the violation, and his refusal to be complicit in the violation, he loses his job. Although he was fired as the result of a due process violation, his due process rights were not violated, and he is thus left without a due process claim. Third party standing, however, provides an avenue for the claim.

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202 Mich. Comp. Laws § 791.251 (2)(a) (1999).

203 Perry v. McGinnis, 209 F.3d 597, 606 (6th Cir. 2000).

204 Wolff v. McDonnell, 418 U.S. 539, 558 (1974).

As explored above, in order to obtain third party standing: (1) the litigant must have suffered some injury due to the impingement of the possessor's right; (2) the relationship between the litigant's advocacy and the possessor's right must be such that the litigant has an appropriate incentive to advocate effectively and that the litigant's advocacy, if successful, will lead to the possessor's greater enjoyment of his right; and (3) the possessor must face some hindrance (but not necessarily an insurmountable hindrance) to the assertion of his own rights. An analysis of Perry's case illustrates that Perry and other hearing officers in his position are excellent candidates for third party standing.

A. Perry's Injury

It is axiomatic that to obtain standing to litigate in federal court (whether it be standing to assert one's own rights or standing to assert a third party's rights), a plaintiff must have suffered an injury in fact.[205] Without a showing of injury, no Article III "case or controversy" exists, and the federal court lacks jurisdiction to adjudicate the matter.[206]

In his suit, Perry, the plaintiff, asserted that he was terminated from his employment as an MDOC hearing officer because he refused to abide by a standard limiting his not-guilty and dismissal findings to ten percent of his total dispositions.[207] His alleged injury, therefore, is his termination.

There can be no real argument as to the application of this prong. Perry's termination resulted in an injury that was "real and immediate," as is required for standing, not "conjectural" or "hypothetical."[208] As such, it is clear that Perry suffered an injury in fact.

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[205] *See* City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983).

[206] *See id.* at 101.

[207] *See* Perry, 209 F.3d at 605.

[208] City of Los Angeles, 461 U.S. at 102.

B. The Close Relationship

The next step of the analysis requires inquiry into the nature of the relationship between Perry and the inmates before him. That relationship is clearly one in which Perry's advocacy as a litigant in federal court is thoroughly intertwined with the inmates' due process rights. Perry has a tremendous incentive to advocate zealously and effectively. Successful advocacy will gain him redress for his wrongful termination; failure before the courts will gain him nothing. In addition, there is little doubt that if Perry is successful, the inmates before him will experience greater enjoyment of their due process rights. If reinstated, Perry would presumably continue to resolve cases as he has in the past—impartially and without concern for finding ninety percent of the inmates before him guilty. Such disposition of cases is fundamental to the notion of due process.[209]

Furthermore, the positive ramifications of a ruling in favor of Perry would almost assuredly reach beyond the inmates appearing before Perry. Other MDOC hearing officers have noted that they felt significant pressure to meet the ten percent standard, indicating that in the absence of the standard they would decide some cases differently.[210] In that the ten percent standard can only import arbitrariness into a hearing officer's decision-making process, a decision made without regard for the standard will be less arbitrary than one made in light of the standard. Because arbitrary decision-making has no place in the dispensation of due process, numerous hearing officers' exclusion of the ten percent standard as a decision making factor will certainly lead to inmates' greater enjoyment of their due process rights. We see, then, that Perry and other hearing officers in his position are properly incentivized to assert the due process rights of inmates, and that if successful, the advocacy will provide inmates greater enjoyment of their due process rights. As

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[209] *See generally* Wolff v. McDonnell, 418 U.S. 539, 558 (1974).

[210] *See* Perry, 209 F.3d at 601-02.

such, it seems clear that Perry and inmates in the prison in which he worked have the relationship necessary to survive the close relationship prong.

The factual scenarios of both *Powers* and *Campbell*, cases in which the Court found the relationship between litigant and possessor sufficient to survive the close relationship prong, further support a finding that the relationship between Perry and the inmates before him should survive the prong.

As noted above, *Powers* and *Campbell* each involved jury selection.[211] The finding of third party standing in both cases was based on the relationship between the accused and the people charged with appraising the accused's conduct. The Court, in both cases, found that the interests of each was intertwined with the interests of the other in such a way that third party standing was appropriate. Like *Powers* and *Campbell*, Perry's case involves the relationship between the accused and the person appraising the accused's conduct. Perry's case, of course, involves a disciplinary hearing officer and a defendant in a disciplinary hearing instead of a jury and a defendant in a criminal trial, but the relationships are essentially the same—they involve the trier and the person being tried.

All things considered, under the *Powers* test Perry clearly has the necessary close relationship with the inmates appearing before him. Perry has an appropriate incentive to advocate zealously, and his advocacy, if successful, can only increase the inmates' enjoyment of their due process rights. The similarities between Perry's case and the facts of *Powers* and *Campbell* further support the conclusion that Perry would survive the close relationship prong.

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[211] *See* Campbell v. Louisiana, 523 U.S. 392, 394-95 (1998); Powers v. Ohio, 499 U.S. 400, 402 (1991).

C. The Hindrance

Finally, we must examine whether a disciplinary hearing defendant faces some hindrance to the assertion of his own rights. As the Court noted in *Singleton* and *Powers*, a litigant need not show that it would be absolutely impossible for the possessor of the right to assert the right. The litigant need only show that the possessor would be hindered, as a practical matter, in attempting to assert the right.

Under this standard, disciplinary hearing defendants are, without doubt, sufficiently hindered. Again, reference to *Powers* and *Campbell* is helpful. In establishing that the excluded jurors in *Powers* were sufficiently hindered under third party standing analysis, the *Powers* Court noted that "[t]he barriers to a suit by an excluded juror are daunting."[212] The Court expounded:

> Potential jurors are not parties to the jury selection process and have no opportunity to be heard at the time of their exclusion. Nor can excluded jurors easily obtain declaratory or injunctive relief when discrimination occurs through an individual prosecutor's exercise of peremptory challenges . . . And, there exist considerable practical barriers to suit by the excluded juror because of the small financial stake involved and the economic burdens of litigation.[213]

The hindrances faced by disciplinary hearing defendants in cases like Perry's are surely more oppressive than these. First, the economic cost of civil litigation for the disciplinary hearing defendants is as burdensome, if not more burdensome, than the cost of civil litigation for excluded jurors. More to the point, however, the disciplinary hearing defendants are deprived of the information

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[212] Powers, 499 U.S. at 414.

[213] *Id.* at 414-15.

necessary to assert their own rights. As noted, the MDOC guilty verdict quota policy was an unwritten one. It consisted of an informal understanding among prison officials. As such, disciplinary hearing defendants could have had no access to documents addressing the scheme. Further, because disciplinary hearing defendants are negatively impacted by the policy, and because they would have grounds to challenge the policy if they knew about it, it is unrealistic to believe that prison officials would volunteer information about the scheme in the absence of extraordinary compulsion.

Finally, the quota system employed in Perry's case is unknown to both inmates and the community at large; it is a system familiar only to prison officials. Prisons are, by their very nature, restrictive, meaning that prisoners generally subsist within an information vacuum. Acquiring any information not readily available within prison walls, therefore, is obviously somewhat difficult. In the case of the quota system, however, the information a prisoner needs to assert his due process rights cannot be found outside of the prison walls either. The prison officials instituting the system are the only people who have access to information about the quota, and, as noted above, they have an incentive to keep the information to themselves.

Consequently, "as a practical matter,"[214] disciplinary hearing defendants are hindered from asserting their due process rights under the quota system. Indeed, the only class of people seemingly unhindered in asserting the disciplinary hearing defendants' due process rights are prison officials such as Perry.

VI. CONCLUSION

Prisoners are a vulnerable lot.[215] They live apart from us in closely regulated environments with neither the amenities nor the

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[214] *Id.* at 414.

[215] *See* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U.L. REV. 543, 631-32 (2000) ("[T]he relative invisibility and low moral status of the

protections of mainstream society. Some of this deprivation flows directly from the very nature of incarceration. Indeed, "[l]awful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen[.]"[216] Lawful imprisonment does not, however, entirely abrogate an inmate's due process rights. Policies which limit the number of inmates who, in prison disciplinary hearings, can be found not guilty of committing infractions that could result in punitive segregation, unconstitutionally deprive inmates of those due process rights.

Because inmates have no access to such policies, and thus no knowledge of a constitutional violation and consequently no means to challenge it, they rely entirely on prison hearing officers to protect their due process rights. If agents of the state improperly prevent hearing officers from protecting those rights through termination, the inmates' due process rights are damaged.

Third party standing is appropriate for Perry and other hearing officers is his position, because: (1) the terminated hearing officer suffers injury in fact; (2) the relationship between the hearing officer's advocacy and the inmate's right is such that the hearing officer has an appropriate incentive to advocate effectively, and the hearing officer's advocacy, if successful, will lead to the inmate's greater enjoyment of his right; and (3) the inmate faces some hindrance in asserting his own right. Indeed, the filing of third party due process claims can serve as an effective method of protecting hearing officers and inmates alike from intra-prison disciplinary hearings perverted by unconstitutional guilty verdict quotas.

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prison population makes prisoners especially vulnerable and heightens the need for accountability.").

[216] Wolff v. McDonnell, 418 U.S. 539, 555 (1974).